No. 96187-5

SUPREME COURT
OF THE STATE OF WASHINGTON

SHANNON C. ADAMSON and NICHOLAS ADAMSON,
husband and wife,

Respondents,

v.

PORT OF BELLINGHAM,
A Washington Municipal Corporation,

Appellant.

AMICUS BRIEF OF INLANDBOATMEN'S UNION OF THE PACIFIC

SMITH GOODFRIEND, P.S.

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On behalf of Inlandboatmen's Union of the Pacific

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Inlandboatmen's Union of the Pacific, based in Seattle, is among the nation's largest maritime labor unions. Its members work as seamen on ferries, tugs, and other commercial vessels.

The workers of the Inlandboatmen's Union (IBU) rely on port owners, particularly the public port districts that operate the major harbor facilities in the state of Washington, to maintain in safe operating condition their wharves and the associated equipment for loading and unloading cargo and passengers from vessels. IBU puts a priority on its members' safety and has a long history of opposing efforts to undermine worker safety whether at sea or on land, and whether by legislation or in the courts.

IBU is thus especially interested in any effort by a public port to evade or diminish its statutory and common law obligations to maintain its premises and the equipment that the port provides on those premises in a safe condition for the protection of workers who are its intended and foreseeable users. Because many IBU members live in Washington and work on Washington waters, IBU submits this amicus brief in support of Respondent Sharon Adamson, urging this Court to answer the certified question consistent with its members' interest in workplace safety.

II. ISSUE ADDRESSED BY AMICUS CURIAE

The Ninth Circuit certified the following issue:

> Is party A (here, the Port of Bellingham) liable as a premises owner for an injury that occurs on part of a leased property used exclusively by party B (here, the Alaska Marine Highway System – the Ferry) at the time of the injury, where the lease has transferred only priority usage, defined as a superior but not exclusive right to use that part of the property, to party B, but reserves the rights of party A to allow third-party use that does not interfere with party B's priority use of that part of the property, and where party A had responsibility for maintenance and repair of that part of the property?

Stated in a way that explains IBU's interest in the Court's resolution of the certified issue,[1] the question addressed here is:

> Whether a public Port district may absolve itself of its duty to maintain in a reasonably safe condition equipment that is part of and integral to the leased premises by granting its lessee vessel owner a right to priority, but not exclusive, use of that equipment?

III. STATEMENT OF THE CASE[2]

Plaintiff Sharon Adamson, a crew member on board the Alaska State ferry M/V COLUMBIA, was seriously injured when the electronically controlled passenger ramp connecting the vessel to the Port of Bellingham's Cruise Terminal collapsed. The Port owned and

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[1] In restating the issue, amicus does not ask this Court to restate the certified question, though the Court has discretion to do so. *Broad v. Mannesmann Anlagenbau AG*, 196 F.3d 1075, 1076 (9th Cir. 1999).

[2] IBU adopts respondent Adamson's Statement of the Case, which recites the underlying facts and the procedural history leading to the jury's verdict in favor of Adamson on her claims against the Port. (Resp. Br. 3-13).

installed the passenger ramp. The Port, as landlord, had entered into a lease with the vessel owner Alaska Marine Highway Systems (AMHS) that granted AMHS "priority use" of its Cruise Terminal, including the passenger ramp.

The lease demised to AMHS certain other areas of the premises for AMHS's "exclusive" use, (Lease § 1.2, ER 340), but defined "priority use" as "superior but not exclusive right to use the identified areas," including the passenger ramp. (Lease § 1.4, ER 340) The Port had the right to allow others to use the ramp and other "priority use areas so long as such use does not unreasonably interfere with [AMHS's] use." (Lease, § 1.4, ER 340)

The Port was required to "maintain the leased premises free of structural or mechanical hazards. . . ." (§ 4.7, ER 345), and had the right to "enter upon the premises at all reasonable times to examine the condition of the same." (§ 5.1(8), ER 348) The Lease also provided that in the event of a third party claim against either the Port or AMHS, the trier of fact should "make an allocation of comparative fault between Lessor and [AMHS] . . ." (§ 6.1, ER 348-49)

A jury found that the Port was negligent in maintaining the ramp and that its negligence caused Ms. Adamson's injuries, basing its verdict on several different grounds. With respect to the issue

certified to this Court, the jury found that the Port (1) breached its duty of care to Ms. Adamson as an owner and occupier of land and "as a landlord;" (2) was "negligent in failing to perform its promise to perform repairs under the contract" and (3) breached its statutory duty under WSHA to maintain safe conditions on multi-employer work site. (ER 162)

The Ninth Circuit asked this Court whether under Washington law the lessee AMHS's right to priority use under its lease "can be considered to give [it] exclusive control" of the defective passenger ramp that caused Ms. Adamson's injuries. *Adamson v. Port of Bellingham*, 899 F.3d 1047, 1051-52 (9th Cir. 2018).

IV. ARGUMENT

A. Under the Certification Order, the Port's liability is established by the jury's verdict unless this Court concludes that the Lease gave the Port's lessee exclusive control of the Port's passenger ramp.

Injured maritime workers have the right to compensation for injuries if they establish a defendant's liability under a variety of legal theories.[3] In the instant case, Ms. Adamson sought compensation from the Port by asserting claims for negligence based on the Port's

[3] For instance, a crew member may assert claims for maintenance and cure, under the doctrine of unseaworthiness, and negligence under the Jones Act. *See, e.g., Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 272 P.3d 827, *cert. denied*, 568 U.S. 823 (2012).

contractual, common law, and statutory duties of care. In certifying this case to this Court the question whether AMHS's right to "priority use" of the ramp under the lease is tantamount to exclusive control, the Ninth Circuit did not distinguish among these theories. Instead, it held that the jury was correctly instructed, and the district court's judgment must therefore be affirmed as a matter of law, unless the Port divested itself entirely of its right and obligation to maintain, inspect and control the passenger ramp. 899 F.3d at 1051.

Under the Ninth Circuit's certification order, the Port's defense to liability turns on whether the "priority use agreement" – those provisions of the lease that give the lessee AMHS the right to use the ramp to the exclusion of others when its ferry is in port – absolves the Port of its tort liability as a landlord with retained control of that portion of the premises. The Ninth Circuit held that the issue of whether the Lease's "priority use" provisions gave AMHS exclusive control is dispositive:

> If the Washington State Supreme Court concludes that a lessee's right to priority usage of a part of a facility is sufficient to transfer responsibility for injuries entirely away from the lessor, we will reverse the district court with instructions to hold a new trial that appropriately instructs the jury on bases of liability not premised on the assumption that the Port is liable as a premises owner. If, however, the Washington State Supreme Court decides that a priority usage agreement does not

> absolve a landlord of liability as a possessor of property, we will affirm the district court.

899 F.3d at 1051.

The Port pays lip service to the requirement that this Court address the issue set forth in the Certification Order, but its arguments disregard that the Ninth Circuit made this Court's answer to the certified question outcome-determinative to the Port's defense as a matter of law given the jury's verdict. The Port incorrectly asserts that the Ninth Circuit implicitly rejected one or more of the multiple theories of liability relied upon by the district court below (App. Br. 10-20), ignoring that several of Ms. Adamson's theories in the district court turn on this certified issue of "exclusivity."

This notion of "exclusivity" is central to the Port's defense. Ms. Adamson's argued that the Port breached its duty of care established by the Lease provisions reserving to the Port the obligation to repair and maintain the ramp, that the Port breached its duty as a landlord and owner to maintain and inspect areas accessible to the public, employees of its tenant, and other foreseeable users, and that the Port breached its statutory duty as an owner in control of a multi-employer job site. The Port's argument that these issues "are not before this Court" (Reply Br. 6-12), or alternatively will require remand and new trial (Reply Br. 7),

contravenes the plain language of the certification order and ignores that the Port's defense to Ms. Adamson's theories of recovery turn on the issue whether the Port's Lease gave its tenant AMHS exclusive and sole control over the ramp. As explained below, it did not; the Port continued to have contractual, common law, and statutory duties to workers, passengers, and other foreseeable users that were the basis for the jury's verdict here.

B. The Port, as landlord under a Lease that gave its tenant only "priority use," retained control and responsibility for maintaining in safe condition the passenger ramp.

1. There is no "general rule of landlord nonliability," and the doctrine of *caveat emptor* does not bar an injured party's claim against a lessor that has not completely transferred control of its premises to a lessee.

The Port's reliance on the anachronistic doctrine of *caveat emptor* is misplaced. The Lease with AMHS was not a sale in fee of the Port's passenger terminal. And, as the certified question suggests, there is no "general rule of landlord nonliability" (Reply Br. 14) for portions of the premises and equipment that have not been exclusively transferred to a tenant under a lease. Instead, this Court has adopted the principles espoused under the *Restatement (Second) Torts*, §§ 357, 360 (1965) under which a landlord who has expressly covenanted to repair the demised premises or retains control over a portion of

them, is liable to a tenant, his guests or its employees for injuries resulting from its failure to repair or perform maintenance.

The "general rule of landlord nonliability" advanced by the Port is a vestige of the English common law's bias in favor of the land-owning class. 2 Harper & James, *The Law of Torts*, § 27.1 (1956). While the *caveat emptor* doctrine had already been seriously eroded when the *Restatement (Second) Torts* was published in 1965, it has since been even more widely rejected:

> As in other areas of the law of torts (e.g., products liability), the doctrine of *caveat emptor* as it applies to tenants has undergone substantial erosion, and today numerous exceptions are recognized, narrowing its strict application. While continuing to pay lip service to the general rule, the courts have expended considerable energy and exercised great ingenuity in attempting to fit various factual settings into the recognized exceptions.

Restatement (Second) of Property, Land. & Ten., Ch. 17, Intro. Note (1977). *See MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 393, 11 N.E. 1050 (1916) (Cardozo, J.) (rejecting privity of contract and *caveat emptor* as bar to establishing a tort duty or care).

This Court should resolve the issue of whether the Port's grant of a lease giving AMHS "priority use" of the Port's passenger ramp immunizes the Port for tort liability in light of the policies underlying current tort law rather than an outdated notion of *caveat emptor*. As a public port district the Port is granted the statutory authority to enter

into leases, RCW 53.08.080, and is under a statutory obligation to obtain insurance coverage, RCW 53.08.480, as it is subject to liability "for damages arising out of [its] tortious conduct . . . to the same extent as if [it] were a private person or corporation." RCW 4.96.010.[4] In accordance with "logic, common sense, justice, policy, and precedent," this Court should place responsibility on the party that has the opportunity and ability to assess and apportion risk, and to insure against it. *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 67, ¶ 8, 124 P.3d 283 (2005); *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985).

2. The Lease between the Port and AMHS did not give AMHS exclusive control of the ramp, and provided that the Port would retain control over and repair any portion of the leased premises.

The plain language of the Lease provides that the Port, as landlord, retained control over all priority use areas, including the ramp. More particularly, Ms. Adamson's employer, its lessee AMHS, lacked "exclusive" control over the ramp. A landlord retains control over any portion of leased premises that are reserved to the landlord under the terms of the lease:

> Where the owner of premises leases parts thereof to different tenants and expressly or impliedly reserves other parts thereof for the common use of such tenants,

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[4] *See, e.g., Nielsen v. Port of Bellingham*, 107 Wn. App. 662, 27 P.3d 1242 (2001) (Port liable to moorage tenant's guest for negligent maintenance of dock), *rev. denied*, 145 Wn.2d 1027 (2002).

> it is his duty to exercise reasonable care to keep safe such parts which he reserves for common use, and over which he has control.

Anderson v. Reeder, 42 Wn.2d 45, 48, 253 P.2d 423 (1953). *Accord, Restatement (Second) of Property, Land. & Ten.* § 17.3 (1977). This duty is especially important to maritime workers, who are required to use instrumentalities under the control of the Port (such as the passenger ramp) as a condition of their employment. The Port's attempt to evade liability for its duties because its Lease gave AMHS "priority use" of a dock that could also be used by others when AMHS was not in port is wholly inconsistent with this duty.

The only portion of the Port's premises demised "exclusive[ly]" to AMHS are the Reservation and Ticketing Office, the "Bellingham Cruise Terminal Manager's office," the space referred to as "Warehouse No. 4," and the "Staging and purser booth." (Lease, §§ 1.2, 1.3, ER 340) AMHS has "sole possession and control" of only these specific areas, "subject only to the terms and conditions of this Lease." (Lease § 1.3, ER 340) By contrast, the Lease gives AMHS only "priority use" – a "superior but not exclusive right of use" to the "passenger ramp," where Ms. Adamson's injury occurred. (Lease, § 1.2, ER 340)

The Port retains the right to allow other uses of the ramp and other "priority use areas so long as such use does not unreasonably

interfere with [AMHS's] use." (Lease, § 1.4, ER 340) Under the plain language of these provisions, AMHS did "not [have] exclusive right of use to the identified area[]" of the passenger ramp. (§ 1.4, ER 340) That plain language should be dispositive of the certified question, regardless whether there were or were not other tenants actually using the passenger ramp when the Alaska ferry was not moored at the Port.

The Port, not AMHS, expressly covenanted to repair the ramp. A landlord who expressly covenants to repair and maintain may be liable in tort for injuries to foreseeable users arising from the failure to perform that covenant. *Teglo v. Porter*, 65 Wn.2d 772, 774, 399 P.2d 519 (1965); *Mesher v. Osborne*, 75 Wash. 439, 446, 134 P. 1092 (1913); *Restatement (Second) Property Land. & Ten.*, § 17.5; *Restatement (Second) of Torts* § 357 (1965). The Lease makes the Port "solely responsible" for "repairs of any type," including the obligation to keep all portions of the premises "in good and substantial repair and condition" and to "make all necessary repairs thereto."[5]

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[5] Section 4.1 – Maintenance and Repairs: The lessor will be solely responsible for keeping the leased premises in good repair and tenantable condition. The term 'repair' includes repairs of any type including but not limited to exterior and interior, structural and nonstructural, routine or periodic, except as in case of damage arising from the negligence of the state's agents or employees.

The Lease allocated to AMHS responsibility for only those "fixtures and/or equipment . . . that will have been installed in the premises by [AMHS]." (§ 5.2, ER 348) The Port had to provide an "operations manual" for the ramp, (§ 4.5, ER 344), and required the Port to pay the cost of alterations to the ramp, should any become necessary during AMHS's occupancy. (§ 4.1, ER 343) The Lease specifically obligated the Port to "maintain the leased premises free of structural or mechanical hazards. . . ." (§ 4.7, ER 345) AMHS had the obligation to obtain the written consent of the Port prior to making any "alterations or additions in or to the premises," and gave the Port authority to "enter upon the premises at all reasonable times to examine the condition of the same." (§ 5.1, ER 348)

Finally, under § 6.1, the parties agreed that "[i]n the event a third party asserts a claim for damages against either Lessor or [AMHS] in connection with the lease, the parties agree that either may take those steps necessary for the fact finder to make an

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> 4.1(a) The Lessor shall keep and maintain the leased premises, and all alterations, additions and improvements of any kind which may be erected, installed, or made thereon by the Lessor, in good and substantial repair and condition, including the exterior condition thereof and shall make all necessary repairs thereto.

(ER 343)

allocation of comparative fault between Lessor and [AMHS] . . ." (ER 348-49) This provision would be entirely superfluous were "priority use" of portions of the premises, including the ramp, under the sole and exclusive control of AMHS. *See Adamson v. Port of Bellingham*, 192 Wn. App. 921, 926, ¶ 8, 374 P.3d 170, 173 (2016) (assuming "that the lease may require Alaska to compensate the Port for some or all of the damages it incurs as a result of Adamson's injury.")

Each of these Lease provisions confirm that the Port retained some control over the passenger ramp for the benefit of foreseeable users. There may be compelling circumstances under which a port district transfers the exclusive right to use its property under a lease for a fixed term – and with it, the possibility of tort liability for injuries occurring on its property. But such a transfer must be accomplished by clear and unambiguous language, including indemnity and hold harmless provisions, that are absent here. Anything less – such as the priority use provision in this Lease, under which the Port retained significant responsibility for the condition of the property and the equipment it provided to its lessees – does not absolve the Port of its liability as a landlord for injuries to maritime workers exposed to hazards on Port property.

3. The Port has a common law duty to maintain and repair areas of the premises that others have the right to use.

Because the "priority use" terms of the Port's Lease gave AMHS the right to exclude others from the ramp only when AMHS ferries were actually in Port, the Port is liable under Washington common law, which holds a lessor liable to a tenant, the tenant's employees, and guests, for injuries occurring in areas that are not demised to the lessee for its exclusive use:

> [O]ne who leases a portion of his premises but retains control over the approaches, common passageways, stairways and other areas to be used in common by the owner and tenants, has a duty to use reasonable care to keep them in safe condition for use of the tenant in his enjoyment of the demised premises. *Schedler v. Wagner*, 37 Wn.2d 612, 225 P.2d 213 (1950); *Restatement (Second) of Torts* § 360, p. 250 (1965). The landlord is required to do more than passively refrain from negligent acts. He has a duty of affirmative conduct, an affirmative obligation to exercise reasonable care to inspect and repair the previously mentioned portions of the premises for protection of the lessee.

McCutcheon v. United Homes Corp., 79 Wn.2d 443, 445, 486 P.2d 1093 (1971) (landlord may be liable for failing to maintain lights in stairwell). An employee of the tenant is within the class of persons to whom the lessor's duty runs. *See Highland v. Wilsonian Inv. Co.*, 171 Wash. 34, 17 P.2d 631 (1932); *Restatement (Second) Torts* § 360, comment f ("If the terms of the lease entitle the leasee to permit third

persons to come upon the part of the land retained within the lessor's control, it is immaterial whether they come as invitees of the lessee or as his licensees.").

This Court has long applied these principles of landlord liability to the owners of wharves, such as the Port. "[T]he owner or operator of a dock or wharf is under a positive duty to maintain it in a reasonably safe condition for use." *Nelson v. Booth Fisheries Co.*, 165 Wash. 521, 524, 6 P.2d 388 (1931) (dock owner liable for slip and fall on slippery surface unprotected by guard rail); *Gregg v. King County*, 80 Wash. 196, 141 P. 340 (1914) (dock owner liable for injury caused by loose and unsecured fender pile). Guests and employees of a tenant engaged in mooring are within the scope of the wharf owner's duty of care. *Enersen v. Anderson*, 55 Wn.2d 486, 488-89, 348 P.2d 401 (1960); 94 C.J.S. Wharves § 49 ("The owner or occupant of a pier or wharf must exercise reasonable care to keep it in a safe condition so that those having a lawful right can go on it without incurring risk of injury.").

The lessor's liability for injuries to its tenant's employees extends to those portions of, and instrumentalities on, the premises over which the tenant lacks exclusive control. The comment to the *Restatement*, relied upon by this Court in *McCutcheon,* 79 Wn.2d at

445, makes clear that "[t]he rule stated in this Section applies not only to the hall, stairs, elevators and other approaches to the part of the land leased to the lessee, . . . but also to such other parts of the land or building to the use of which by the express or implied terms of the lease the lessee is entitled, usually in common with other lessees. . ." *Restatement* § 360, Comment d. This obligation to maintain in a safe condition includes "those appliances and devices which he supplies for the common use of his tenants and over which he retains control." Annot, 66 A.L.R.3d 374, § 2(a) (1975).

As comment d to the *Restatement* notes, it is *the right* of others to use a portion of the leased premises in common with the tenant that defeats the tenant's exclusivity. With the landlord's legal right of control comes the duty to maintain those portions of the premises for foreseeable users. Because the Port has never ceded *the right* to inspect and maintain its ramp, that other tenants have not in fact shared use of this portion of the premises during the lease term is immaterial to the Port's duty as a landlord to keep safe for maritime workers a potentially dangerous piece of equipment that is not exclusively demised to its tenant.

Acknowledging that the Port retained a right of control over the ramp under its Lease with AMHS, the Port nevertheless argues

that this Court must find "that the Port retained a right of control during" its tenant's periodic priority use in order to establish the Port's liability under the certified question. (Reply Br. 14) But the fact that AMHS uses the passenger ramp to the exclusion of others during these brief periods of "priority use" – only when its weekly ferry was docked in Bellingham – does not undermine the policy behind landlord liability for the condition of an instrumentality over which it maintains some control.

Like a building's "party room" that can only be reserved and used by one tenant at a time, the ramp is a type of common area that can be accessed only by one vessel at a time Relying on temporally limited "priority use" to absolve the Port of its duty as a landlord to keep and maintain its premises in repair makes no sense as a matter of public policy because the Port was free to schedule multiple vessels at its facility, each with priority use while a ship was docked.

The Port retained control over this portion of the leased premises. It had the duty as a landlord to maintain the ramp in a safe condition for foreseeable users, including its tenant's employees.

4. The Port's control of a multi-employer work site makes it liable for failing to maintain the premises in a safe condition.

Because the Port did not give its tenant AMHS exclusive control over the passenger terminal and ramp, the Port was also properly charged with a duty to maintain a safe worksite as directed by WSHA. *See Afoa v. Port of Seattle*, 176 Wn.2d 460, 296 P.3d 800 (2013). A statutory directive imposes a duty of care where an injured plaintiff falls within the class of persons the statute is designed to protect. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 477, 951 P.2d 749 (1998).[6]

"An employer who . . . creates a workplace safety hazard may be liable under OSHA even if the injured employees work only for a different employer." *Afoa*, 176 Wn.2d at 472. In asking this Court whether the relationship between the Port and AMHS vested exclusive control over this portion of the jobsite to AMHS, the Ninth Circuit apparently accepted the theory that the Port could be liable under *Afoa* if in fact the Port retained some control over this multi-employer worksite.

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[6] For instance, the landlord's breach of the statutory warranty of habitability is a recognized basis for a residential tenant's cause of action for injury. *Lian v. Stalick*, 106 Wn. App. 811, 821-22, 25 P.3d 467 (2001) (relying on *Restatement (Second) of Property* § 17.6 to impose tort duty upon landlord who breached Residential Landlord-Tenant Act's warranty of habitability, RCW 59.18.060); WPI 130.06.

The doctrine of jobsite owner liability is particularly important to maintaining safety for maritime workers. Longshore workers, contractors, as well as crew members, have a right to a safe workplace regardless of which employer is paying the Port rent.

The Port incorrectly asserts that the Ninth Circuit necessarily rejected this theory of liability, but its assertion that AMHS had exclusive control over the ramp when it used the Marine Facilities does not support that argument. Afoa and his employer had exclusive control over the "push back" vehicle he was driving to service a plane owned by the airline that was paying rent to the Port of Seattle. Yet the Port of Seattle could nonetheless be held liable for failing to maintain unsafe portions of the workplace shared by airline employees, ground service and other contractors, that was under its ultimate control.

Here, Ms. Adamson was an AMHS employee using the Port's equipment in common with others, including longshoremen and the port's own employees and contractors, as well as passengers. As the owner and operator of the ramp, the Port bears the ultimate responsibility for workplace safety in such multi-employer worksites. Accepting the argument that "priority use" agreements immunizes a port from its occupational safety obligations under WISHA would set a dangerous precedent. At a time when the federal government is

relaxing its enforcement of labor laws, this Court should refrain from watering down Washington's commitment to work place safety.

V. CONCLUSION

The Port remained responsible for the safety of the passenger ramp at the Bellingham passenger terminal. This Court should hold that the priority use provisions of the Port of Bellingham's Lease with AMHS does not shift to the Port's lessee exclusive responsibility for the maintenance and safety of the Port's passenger ramp.

Dated this 11th day of January, 2019.

SMITH GOODFRIEND, P.S.

By: _____
Howard M. Goodfriend, WSBA No. 14355

On behalf of Inlandboatmen's Union
of the Pacific

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on January 11, 2019, I arranged for service of the foregoing Amicus Brief of Inlandboatmen's Union of the Pacific, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 11th day of January, 2019.

Andrienne E. Pilapil

SMITH GOODFRIEND, PS

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